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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

DUANE GALLOWAY, ON BEHALF OF
SEAN AND KELLY GALLOWAY, MINORS,

Petitioner,

-vs-

LORIMAR MOTION PICTURE
MANAGEMENT, INC, ET AL.

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

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QUESTION PRESENTED

Does a state court have an obligation to entertain an action under the Securities Act of 1933 when that action is properly before the court pursuant to the concurrent jurisdiction provision of the Securities Act of 1933?

LIST OF PARTIES

The parties to the proceeding below are the parties presently before this Court. The petitioner is Duane Galloway. The respondents are Lorimar Telepictures Corporation, Lorimar Motion Picture Management, Inc., Prudential-Bache Properties, Inc., and Prudential-Bache Securities, Inc. The individual respondents are Merv Adelson, Michael Meltzer, Peter Chernin, Lee Rich, Craig Baumgarten, J. Anthony Young, James J. Darr, Frank Giordano, and Brian J. Martin.

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IN THE SUPREME COURT OF THE UNITED STATES

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No. _____

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LORIMAR MOTION PICTURE
MANAGEMENT, INC, ET AL.

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

The petitioner, Duane Galloway, respectfully prays that a writ of certiorari issue to review the Entry of the Ohio Supreme Court, entered in the above captioned proceeding on March 21, 1990,

which declined to accept appeal from the Richland County, Ohio Court of Appeals.

OPINIONS BELOW

The Judgment and Order and Memorandum Decision of the Richland County, Ohio Court of Common Pleas in the case entitled Duane Galloway v. Lorimar Motion Picture Management, Inc., Case No. 88-239-C, dated February 21, 1989, is reprinted as Appendix C.

The Opinion of the Fifth District Court of Appeals, Richland County, Ohio in the case entitled Duane Galloway v. Lorimar Motion Picture Management, Inc., Case No. CA-2681, dated December 6, 1989, is reprinted as Appendix B.

The Entry of the Supreme Court of Ohio in the case entitled Duane Galloway v. Lorimar Motion Picture Management, Inc.,

Case No. 90-160, dated March 21, 1990, is reprinted as Appendix A.

JURISDICTION

Jurisdiction of this Court to review the Entry of the Ohio Supreme Court, dated March 21, 1990, is proper under 28 U.S.C. § 1257.

STATUTES INVOLVED

This case involves the following statutes: Section 11(a) of the Securities Act of 1933 [hereinafter the "Securities Act"], 15 U.S.C. § 77k(a); Section 12(2) of the Securities Act, 15 U.S.C § 771(2); and, Section 22(a) of the Securities Act of 1933, 15 U.S.C. § 77v(a). The statutes listed above are reproduced in Appendix D.

STATEMENT OF THE CASE

The Parties

On October 1, 1985, respondent Lorimar Motion Picture Management, Inc. (hereinafter "Managing General Partner LMPM") and respondent Prudential-Bache Properties, Inc. (hereinafter "Co-General Partner") organized Lorimar Film Partners, L.P. (hereinafter "LFP Limited Partnership") as a Delaware Limited Partnership.[1] Managing General Partner LMPM was assigned primary managing responsibility and authority over the LFP

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[1]Managing General Partner LMPM was formed in August, 1985. It is a wholly owned subsidiary of respondent Lorimar Telepictures Corporation. Managing General Partner LMPM was formed to organize the LFP Limited Partnership.

Co-General Partner (Prudential-Bache Properties, Inc.) is a subsidiary of Bache Group, Inc. Respondent Pru-Bache Securities, Inc., the entity that sold the securities presently at issue, is an affiliate of Respondent Co-General Partner.

Limited Partnership. Co-General Partner, and its affiliates, marketed and sold the securities, and, had other, important functions and duties which will be explained in the course of the argument.

Respondent individuals signed the Registration Statement and/or were members of the Advisory Committee. Importantly, the Advisory Committee refers to the Committee established by respondents (in the offering Prospectus) to protect the individual investors.

Petitioner, Duane Galloway,[2] purchased the securities described below, on behalf of his minor children, in early 1986. Galloway purchased the securities through the Mansfield, Ohio office of Pru-Bache Securities, Inc.

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[2]Galloway brought his action on behalf of himself and as a representative of the class of purchasers of the securities.

The Transaction

LFP Limited Partnership was formed for the purpose of raising equity to invest in feature length motion pictures. LFP Limited Partnership was capitalized from two sources. One-half of the capital was contributed by Managing General Partner LMPM. The other half of the capital was obtained from investors who purchased Limited Partnership "units."[3] The units were offered for sale by way of a Registration Statement and Prospectus dated December 6, 1985. Respondent Pru-Bache Securities, Inc. was the selling agent, and sold over $400,000 worth of units to 467 Ohio resident/investors.

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[3]Although the units were marketed ostensibly as Limited Partnership interests, the Partnership Agreement (attached to the Prospectus as an appendix) gave purchasers of Limited Partnership interests the status of assignees.

The December, 1985 Registration Statement and Prospectus provided to investors what was, facially, concrete assurance that their investment would not be subject to the conflicts of interest that would arise in the related-party transactions between LFP Limited Partnership and other Lorimar affiliates. The insurance against self-dealing was provided in the form of a Conflict of Interest Advisory Committee. This Advisory Committee was expressly designed to protect Limited Partners. The Prospectus, at page 24, provided:

> Certain provisions of the Partnership Agreement are designed to protect the interests of the Limited Partners in situations where conflicts exist by providing that **any transactions** between the Partnership and the Managing General Partner or an affiliate of the Managing General Partner must be approved by the

> Advisory Committee or, in certain instances, the Co-General Partner.

Prospectus, at 24 (emphasis added). Furthermore, that same document furnished to potential investors provided:

> no General Partner will have the right to cause the Partnership to . . . pay for any service performed by or goods supplied by or otherwise transact business with a General Partner of any Affiliate of a General Partner, except as otherwise specifically permitted by the Partnership Agreement . . . .

Id. at 46. Thus, respondents created a duty to seek Advisory Committee approval in certain conflict situations.[4]

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[4]The Conflict of Interest Advisory Committee was of crucial importance to the unit investors given the accounting practices in "Hollywood" transactions. These accounting methods, which are, at best, irregular, result in fabricated losses since related parties buy products and services from each other at fabulously inflated prices. These accounting practices have received notorious publicity

The Misstatements and Omissions

Alas, the Prospectus provisions which were supposed to protect the unit investors from self-dealing were washed away in the wake of a non-existent Advisory Committee. The simple fact is that there never was a functioning Advisory Committee in place (i.e., the Advisory Committee was fraudulently non-existent). The Advisory Committee never met. Thus, without the Advisory Committee protections, the LFP Limited Partnership had free reign to engage in self-dealing.[5]

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of late from the ongoing Art Buchwald litigation.

[5]LFP Limited Partnership was formed to invest in feature-length films. Because the Advisory Committee was not a viable entity and therefore did not fulfill its "policing" function, respondents selected a related party film (despite the fact that the Prospectus provided "The Advisory Committee must consent to the production of . . . a related party film." Prospectus, at 35.). Despite the fact that the film was profitable at the box office, the

Petitioner's Causes of Action

Petitioner alleged that the respondents' misstatements and omissions involving the supposed protections provided by the non-existent Advisory Committee were violative of Sections 11(a) and 12(2) of the Securities Act, 15 U.S.C. §§ 77k(a) and 771(2), respectively; and a breach of the fiduciary duties respondents owed to petitioner.

Petitioner brought this action in Ohio state court pursuant to the concurrent jurisdiction provision of Section 22(a) of the Securities Act, 15 U.S.C. § 77v(a).

The Ohio State Courts

The Richland County, Ohio Court of Common Pleas (trial court), dismissed

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film's production was, not surprisingly, over-budget. This overrun was repaid to respondents by respondents' taking 58% of the film's profits (rather than the 50% provided for in the Prospectus).

petitioner's action, and, by a Judgement and Order and Memorandum Decision, dated February 21, 1989, "slammed the door" on petitioner's cause.[6] Petitioner appealed to the Fifth District Court of Appeals for Ohio, but the court of appeals affirmed the dismissal of the federal causes of action.[7] The Ohio Supreme Court declined to review (sua sponte dismissal) the misapplication of principles of federal and state law.

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[6] The Memorandum Decision, requisitioned every imaginable federal securities law and/or state law doctrine to defeat petitioner's claims. Each doctrine was layered upon the others. See Appendix C.

[7] Importantly, the Fifth District did reverse the dismissal of the breach of fiduciary duty claim. See Appendix B.

REASONS FOR GRANTING THE WRIT

I.

THE OHIO COURTS, BY MISAPPLYING FEDERAL AND STATE LAWS AND LEGAL PRECEDENT, EFFECTIVELY EVADED THE OBLIGATION TO ADDRESS ACTIONS PROPERLY BROUGHT IN STATE COURT UNDER THE CONCURRENT JURISDICTION PROVISION OF THE SECURITIES ACT OF 1933

Actions under the Securities Act of 1933 are, by decree of Congress, correctly brought in either state or federal court. However, in this case, the Ohio state courts effectively refused to address those claims properly before the courts. In effect, the Ohio state courts, by misapplying legal and equitable doctrines, rules, and precedents, (detailed as parts I(a)-(e) below) succeeded in evading their Constitutional and Congressionally mandated

obligation to enforce the laws of this Country.

Congress required state courts to hear certain federal securities causes of action such as were presented by petitioner. The Ohio state courts, nevertheless, refused to exercise the power which is indisputably within the bailiwick of the state courts. If this Honorable Court, in its discretion, declines to review this case and correct the injustice exercised against the numerous unit holders, then a dangerous and incorrect line of precedent will have been established.[8] This incorrect line of precedent will have the de facto effect of scrapping concurrent jurisdiction under the

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[8]The incorrect application of various federal securities law principles is addressed infra. Of special importance to this Court is the misapplication of the important Santa Fe doctrine.

Securities Act since no future plaintiff could ignore what happened to Duane Galloway, the petitioner in this case. If this Honorable Court declines to correct the injustice practiced against the petitioner in this case, then every future plaintiff who contemplates an action under the Securities Act will file in federal district court.

What follows is an exposition of the erroneous legal grounds which all combined to preclude petitioner's access to the very court system to which Congress long ago decreed that he was entitled. Each ground, which was, in essence, a nail in the coffin of the petitioner's action, is not presented for the notion that each ground must be reviewed and reversed on its merits (except for the erroneous application of the Santa Fe doctrine); rather, by demonstrating the mis-

application of laws and precedents, the petitioner will extract the quintessence of his point: that the Ohio state courts have evaded their obligation to undertake the claims of their own citizens that are properly before them.

The Ohio courts' holding regarding the Santa Fe doctrine presents this Honorable Court with an important, timely question of federal law. The misapplication of the Santa Fe doctrine, which was perpetuated through the entire Ohio court system, confers jurisdiction on this Court to re-affirm the concurrency of jurisdiction under the Securities Act, while simultaneously repairing an erroneous application of an important federal concept.

I(a)

Application of the Santa Fe Doctrine

The Ohio courts[9] determined that petitioner's claims should be dismissed based on Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977). Appendix C at 4-5; Appendix B at 14 (Appendix citations refer to page numbers at bottom of page). The Ohio courts found that petitioner's claims were essentially claims for breach of fiduciary duty, in contravention of the Santa Fe rule. However, the result reached

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[9]When using the term "Ohio courts," petitioner notes that the Supreme Court of Ohio declined to correct the grave errors of the courts below. See Appendix A. Thus, in showing the misapplication of various legal doctrines, cases, and precedents, petitioner will necessarily refer to the decisions of the Fifth District or the Court of Common Pleas.

by the Ohio courts is wrong for two reasons.[10]

First, in Santa Fe, this Court ruled only that the focus of federal securities laws was on full disclosure, not the underlying fairness of the transaction. Santa Fe, 430 U.S. at 477-78. The Santa Fe rule was not intended to preclude all actions that also encompassed a breach of fiduciary duty claim. Kas v. Financial General Bankshares, Inc., 796 F.2d 508, 512 (D.C. Cir. 1986) (plaintiff may not "bootstrap" a state law claim into federal court by alleging that defendants "failed to disclose that breach of fiduciary duty." Id. at 513.). See also Section 16 of the Securities Act, 15 U.S.C. § 77p.

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[10] In order to preserve the integrity of the Santa Fe doctrine, this Court must address the Ohio Courts' application of this important federal securities law principle.

In the present case, the petitioner alleged in his Complaint that, although established, the Advisory Committee had no function or operation after the Prospectus was published. The Prospectus, in detailing the tasks and function of the Advisory Committee, contained material misstatements and omissions since that Advisory Committee was fraudulently non-existent the moment after the unit investors' money was securely in the grasp of Managing General Partner LMPM and its subsidiaries.[11]

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[11]Defendants have received too much mileage from petitioner's allegation in his Complaint which stated that defendants "intended not to adhere to Advisory Committee procedures." That phrase does not connote an allegation that defendants failed to disclose that they intended to breach fiduciary duties. Rather, petitioner's Complaint alleged that the Prospectus, which detailed the tasks and functions to be shouldered by the Advisory Committee, was nothing more than a smoke-screen which was intended to assuage investors' concerns regarding Hollywood

The Fifth District Court of Appeals wrote:

> To endorse appellant's position would permit stockholders who are unhappy with a management decision to claim that management "did not intend to" follow assertions set out in the prospectus and thereby convert a breach of fiduciary duty claim into a federal security claim.

Appendix A at 14. The above passage is indicative of how the courts misconstrued petitioner's claims. In the present case, the Prospectus detailed the tasks and functions that the Advisory Committee was charged with performing. However, the Advisory Committee was fraudulently non-existent. Therefore, the Prospectus

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film-making and accounting practices. Hence, the Prospectus, which purported to offer investors protection, contained misstatements and omissions since that Advisory Committee was never to perform any task and was never anything but a fraudulently non-existent entity.

statements were misstatements and/or omissions. Indeed, the reasoning of the Fifth District set out above would preclude every securities law claim since a statement made but not intended to be followed is held not a misstatement but a non-disclosure of a breach of fiduciary duty![12]

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[12]The Ohio courts analytically disregarded the principle that, on a motion to dismiss, the court is required to view the complaint in the light most favorable to the plaintiff. Phung v. Waste Management, Inc., 23 Ohio St. 3d 100, 102, 491 N.E.2d 1114, 1116 (1986); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Miree v. DeKalb County, 433 U.S. 25, 27 (1977); Michaels Building Co v. Ameritrust Co., N.A., 848 F.2d 674, 679 (6th Cir. 1988) (quoting Conley, 355 U.S. at 45-46). In the present case, had the Ohio courts applied the correct analysis of Santa Fe in light of the allegations in the Complaint, a different result would have been mandated. Instead, the Ohio courts have established that a statement in a prospectus is not a "misstatement" within the ambit of the federal securities laws so long as the those who made the misstatement did not intend to follow that which was [mis] stated. See Appendix B at 14.

Secondly, Santa Fe does not apply to actions brought under Sections 11 and 12(2) of the Securities Act. This Court held that the failure to disclose a breach of fiduciary duty is not actionable under Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 because such breach of fiduciary duty is not "'manipulative or deceptive' within the meaning of the statute." Santa Fe, 430 U.S. at 473-74. However, Sections 11 and 12(2) do not address deceptive or manipulative conduct. See Herman & MacLean v. Huddleston, 459 U.S. 375, 382 (1983) (liability under Section 11 is "virtually absolute, even for innocent misstatements"). In summary, the Ohio courts misapplied the Santa Fe doctrine to a situation where it was not applicable in the first place. This Court, to preserve the integrity of the doctrine, must re-

instruct the Ohio courts as to its application.

I(b)

Summary Judgment

Petitioner's federal securities law claims were disposed of by summary judgment. However, summary judgment is proper only if reasonable minds could come to but one conclusion, with all the evidence construed most strongly in favor of the party defending the motion. Ohio R. Civ. P. 56(C). The Ohio courts granted respondents' motion for summary judgment on the ground that there were no misstatements or omissions of material facts in the Prospectus. See Appendix C at 5; Appendix B at 16. However, petitioner has demonstrated that there were misstatements and omissions in the Prospectus (detailed descriptions of the supposed functions of a fraudulently non-existent Advisory

Committee). Unfortunately, these misstatements and omissions were characterized by the Ohio Courts as allegations of nondisclosure of breach of fiduciary duty. See Appendix C at 5; Appendix B at 14; infra I(a) (discussion of misstatements and omissions and Santa Fe doctrine). Furthermore, the materiality of the misstatements and omissions must await determination by a jury. Kas, 796 F.2d at 514.

The Fifth District found that the Prospectus provided that "Advisory Committee procedures could be bypassed." Appendix B at 16. However, the Prospectus did not provide for the "bypass" of Advisory Committee procedures. The Prospectus did provide that the Advisory Committee could be dissolved. However, even though the Prospectus did disclose that the Advisory Committee protections

could be dissolved, summary judgment on the ground that the Prospectus did not contain material misstatements and omissions was improper for two reasons.

First, the Prospectus unambiguously declared that the Advisory Committee would function prospectively. Thus, the Advisory Committee was granted important functions in the Prospectus and, if such Committee was to be dissolved, then the Prospectus provisions detailing the Advisory Committee's prospective functions were certainly misstatements and/or omissions.[13]

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[13]Potential "dissolution" is simply not equivalent to the fact that the Advisory Committee, although "de-jure" established, did not perform any of the functions that the Prospectus clearly indicated that it would. The Prospectus cloaked the Advisory Committee with important policing functions, and investors contributed their money based on those very representations.

Secondly, summary judgment was improper on the ground that the Prospectus did not contain material misstatements and omissions since, assuming arguendo that the dissolution provision rendered the function of the Advisory Committee nugatory, there still existed a question of fact concerning whether the dissolution provision was adequately disclosed or was improperly "buried" within the Prospectus. See Isquith v. Middle South Utilities, Inc., 847 F.2d 186, 208 (5th Cir.), cert. denied, 109 S. Ct. 310 (1988); Greenapple v. Detroit Edison Co., 618 F.2d 198, 205 (2d Cir. 1980); Kas, 796 F.2d at 516; Gould v. American Hawaiian Steamship Co., 331 F. Supp. 981, 995-96 (D. Del. 1971).

I(c)

Pleading Fraud With Particularity

The Ohio courts ruled that Civ. R. 9(B) applied to petitioner's action and

thus dismissed his action on the ground that petitioner had failed to plead fraud with particularity. Appendix C at 7 n.*; Appendix B at 17-18. This result is erroneous for two reasons.

First, it is not clear that Ohio Civ. R. 9(B), or its federal equivalent, Fed. R. Civ. P. 9(b), applies to actions brought under Sections 11 and 12(2) of the Securities Act. In fact, the majority, well-reasoned cases reach the opposite conclusion.[14] See, e.g., Loan v. FDIC, 717

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[14]There is a split among some courts regarding the issue whether [Fed. R. Civ. P.] 9(b) applies to actions brought under Sections 11 and 12(2) of the Securities Act. See Center Sav. & Loan Ass'n v. Prudential-Bache Securities, 679 F. Supp. 274 (S.D.N.Y. 1987). While noting what appears to be a split even in the same District, the Center Savings case, relied upon by defendants, involved pleadings which were grossly deficient. Id. at 276-77 ("Here five separate loan associations, each operating independently of the other, each with its own staff of employees and representatives, lump themselves together for pleading purposes and charge Pru-Bache

F. Supp. 964, 968 n.9 (D. Mass. 1989) (Rule 9(b) does not apply to § 12(2)); Glaser v. Norris, No. 9538 (Del. Ch. May 1, 1989) (Lexis, States library, Del. file); Gould v. Marlon, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,408 at 97,129 (D. Nev. August 29, 1987) (9(b) requirements held not to apply in Section 11 action (citing Herman & MacLean v. Huddleston, 459 U.S. 375, 383 (1983)); Schoenfeld v. Giant Stores Corp., 62 F.R.D. 348, 350-51 (S.D.N.Y. 1974)); In re Lilco Securities Litigation, 625 F. Supp. 1500, 1502-03 (E.D.N.Y. 1986); Erikson v. Kiddie, [1986-87 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,889 at 94,312 (N.D. Cal. February 24,

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with having defrauded them through the unspecified declarations, some in writing, some oral, of employees and representatives, some identified, some not, over a five-month period of time." Id.). This case presents this Court with a prime opportunity to resolve the split.

1986) (9(b) pleading requirements do not apply to action under Section 12(2)); Ross v. Warner, 480 F. Supp. 268, 273 (S.D.N.Y. 1979) (9(b) does not apply to Section 11).

Secondly, the Fifth District affirmed the Court of Common Pleas holding that the petitioner failed to meet the "strict requirements of Rule 9(B)." Appendix C at 7 n.* (emphasis added). Thus, even if Civ. R. 9(B) does apply to petitioner's federal securities laws claims, the Ohio courts erred when they applied an overly strict standard under Civ. R. 9(B). In fact, Civ. R. 9(B) requires only that the allegations in a complaint give defendants fair notice of plaintiff's claims and the grounds upon which they rest in order that defendants may prepare a responsive pleading. Michaels Building Co., 848 F.2d at 679. Additionally, other factors further

ameliorate the lessened, though correct, 9(B) standard.

Rule 9(B) does not abrogate the pleading requirements of Rule 8. Rule 8 requires all averments be "simple, concise, and direct . . ." Michaels Building Co., 848 F.2d at 679.

Furthermore, the Civ. R. 9(B) standard is not construed harshly against the plaintiff where discovery has not yet commenced. Id. at 680 (where facts are within defendants' control, court should be reluctant to dismiss prior to discovery); In re Craftmatic Securities Litigation, 890 F.2d 628, 645 (3d Cir. 1989) ("application of Rule 9(b) prior to discovery 'may permit sophisticated defrauders to successfully conceal the details of their fraud.'" (citation omitted)). Thus, had the correct standard been applied by the Ohio

courts, petitioner's claims would not have been dismissed on Rule 9(B) grounds.

I(d)

Forum Non Conveniens

Incredibly, the Ohio courts applied the doctrine of forum non conveniens to preclude 467 Ohio residents from seeking redress in the Ohio court system for an investment-turned-sour that was purchased in Ohio, when the United States Congress clearly gave the Ohio courts jurisdiction to hear just such a claim. See Appendix B at 21-22; Appendix C at 11-13.

The doctrine of forum non conveniens was judicially recognized by the Ohio Supreme Court in Chambers v. Merrill-Dow Pharmaceuticals, Inc., 35 Ohio St. 3d 123, 519 N.E.2d 370 (1988). However, the facts which warranted application of the doctrine of forum non conveniens in

Chambers are inapposite to the facts of the instant case.

In Chambers, each plaintiff was a citizen of Great Britain and was suing sole defendant Merrill-Dow, which was principally located in Hamilton County, Ohio. Id. at 124, 519 N.E.2d at 371 (syllabus by the court). The plaintiffs were suing in Ohio state court because Ohio law provided certain important legal and tactical advantages that were not available in any other foreign forum. Id. at 133, 519 N.E.2d at 378-79. The Supreme Court of Ohio, after reviewing the private and public interest factors,[15] determined that

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[15]The petitioner is not attacking the analysis of the public and private interest factors. Rather, the petitioner maintains that the doctrine of forum non conveniens is not applicable to the present factual situation. Because the doctrine is inapplicable in this context, the Ohio courts erred in applying the factors in the first place. The Chambers facts are inapposite to the facts of the present

the trial court had not abused its discretion in finding that the doctrine of forum non conveniens was applicable to the case. Id. at 132-33, 134, 519 N.E.2d at 377-79.

In the present case, unlike Chambers, the doctrine of forum non conveniens was applied to preclude 467 plaintiff/residents of Ohio from seeking redress in their own state's judicial system. The Ohio courts turned the doctrine of forum non conveniens on its

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case, and, as a result, the threshold necessary to apply a forum non conveniens analysis has not been crossed. The doctrine of forum non conveniens should not be a tool by which state courts can avoid addressing complex litigation. "State courts have both the power and the duty to enforce obligations arising under federal law, unless Congress gives the federal courts exclusive jurisdiction." Society Nat'l Bank v. Kienzle, 11 Ohio App. 3d 178, 181, 463 N.E.2d 1261, 1264 (Cuyahoga Co. 1983) (citations omitted) (emphasis added).

head. Chambers stands for the proposition that non-resident plaintiffs may be precluded from clogging-up the court systems so as to prejudice the access of state residents to the judicial system that those very residents have paid for. Id. at 129, 133, 519 N.E.2d at 375, 379 (citations omitted). The doctrine of forum non conveniens is not supposed to deny a citizen/plaintiff access to his own forum; rather, the doctrine of forum non conveniens is designed to insure a citizen/plaintiff access to the judicial system of his home state by allowing a court to dismiss actions brought by plaintiffs with little or no connection with the forum state. Id. at 129, 519 N.E.2d at 375 (citations omitted).

In Chambers, the Supreme Court of Ohio held that the application of the doctrine of forum non conveniens was

conditioned upon the availability of an alternate forum. Id. at 126, 519 N.E.2d at 373. In the present case, the Common Pleas court made no finding that an alternate forum existed or that plaintiff would be able to maintain suit in that alternate forum.[16] See Appendix C. The Ohio

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[16]The net effect of dismissal on forum non conveniens grounds is denial of redress of grievance in an Ohio forum to 467 Ohio residents' claims under the federal securities laws. "[A] [trial court] abuses its discretion by unconditionally dismissing actions on the ground of forum non conveniens when the statute of limitations has likely run in the alternative forum." Johnson v. G.D. Searle & Co., 552 A.2d 29, 30 (Md. 1989) (emphasis added) (all recent forum non conveniens decisions addressing the issue have held that "the prerequisite of an available alternative forum requires that the defendant who moves for dismissal waive limitations which had run in the alternative forum before the action was filed in the inconvenient forum." Id. at 35.). In the present case, it is not clear what effect dismissal of petitioner's federal law claims on grounds of forum non conveniens will have under the statute of limitations provision, Section 13, of the Securities Act. However, the trial court, and as affirmed by the Fifth District,

Supreme Court, in reviewing the application of forum non conveniens in Chambers, expressly found that "a viable alternative forum exists in the United Kingdom." Chambers, 35 Ohio St. 3d at 134, 519 N.E.2d at 379. Additionally, a case can be dismissed on grounds of forum non conveniens when:

> conditioned upon the refiling of the action in the alternate forum with defendant consenting to its jurisdiction . . . . [and/or] defendant's consent to waive any statute of limitations defense, consent to comply with the discovery rules of the original forum, and consent to satisfy any judgment rendered against it in the alternate forum.

Id. at 127, 519 N.E.2d at 374 (emphasis

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clearly erred in undertaking no analysis as to the availability of an alternative forum, or the amenability of respondents to suit in that forum.

added).[17] Petitioner has been seriously prejudiced in this instance due to the trial court's failure to insure that an alternate forum was truly available. Such cavalier dismissal without determining that an alternate forum is available is not proper.

Respondents convinced the Fifth

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[17]The requirement that an action be dismissed on ground of forum non conveniens only if an alternate forum is available, Chambers, 35 Ohio St. 3d at 126, 519 N.E.2d at 373, implicitly requires the dismissing court to make a determination that the action is maintainable in the alternate forum. A contrary result does not require the dismissing court to insure the amenability of the defendant to suit in the alternate jurisdiction and, thus, defeats the requirement that an alternate forum exists -- transforming Ohio forum non conveniens to the New York brand. See Islamic Republic of Iran v. Pahlavi, 478 N.Y.S. 2d 597, 467 N.E.2d 245 (Ct. App. 1984), cert. denied, 469 U.S. 1108 (1985). The Supreme Court of Ohio has ruled that the New York version of forum non conveniens does not apply in Ohio. Chambers, 35 Ohio St. 3d at 126, 519 N.E.2d at 373.

District Court of Appeals to rely on the following language:

'[t]he forum non conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference . . . .'

Chambers, 35 Ohio St. 3d at 127, 519 N.E.2d at 374 (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 511-12 (1947); Koster v. Lumbermens Mutual Casualty Co., 330 U.S. 518, 531 (1947); Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981)). In Chambers, the Supreme Court of Ohio held that invocation of the doctrine of forum non conveniens should not be upset absent an abuse of discretion.[18] Not

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[18]The Supreme Court of Ohio defined abuse of discretion as "'not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency.'" Chambers, 35 Ohio St. 3d at 133, 519 N.E.2d at 378 (citations omitted).

surprisingly, respondents have argued that since the trial court applied the doctrine of forum non conveniens, such an application must stand absent an abuse of discretion. That argument was adopted by the Fifth District. See Appendix B at 22. However, Chambers applied the abuse of discretion standard to limit the ability of a reviewing court to re-analyze the public and private interest factors. Chambers, 35 Ohio St. 3d at 132-33, 519 N.E.2d at 378-79. The abuse of discretion standard does not apply in the present situation because the public and private interest factors are not in issue and never should have come into play. The abuse of discretion standard does not preclude review of the wrongful application of a legal or equitable doctrine when the facts of the

case simply do not allow such a doctrine to be applied. See Archibald v. Cinerama Hotels, 544 P.2d 947, 952 n.8, 126 Cal. Rptr. 811, 816 n.8 (Cal. 1976). Indeed, other, similar cases stand for the proposition that the doctrine of forum non conveniens simply should not have been applied in this context.[19] See, e.g.,

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[19]Respondents maintain that in class actions the choice of forum by the plaintiff should be afforded less weight than in other types of litigation, and cite Koster, 330 U.S. 518, as authority. However, Koster was a derivative action based on diversity of citizenship and involved a suit by one plaintiff, facts which certainly are not analogous to the present situation where 467 Ohio resident/class members are suing to recover over $400,000. See Beres v. Thomson McKinnon Securities, Inc., [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,395 at 97,064 (S.D.N.Y. Sep. 10, 1987) (in class action suit, court distinguished Koster, holding that in a representative action, such as the present one, "plaintiffs' . . . choice of forum should receive its due weight") (citations omitted); Abeloff v. Barth, 119 F.R.D. 315, 330-31 (D. Mass. 1988) ("[t]he weight to be given to the plaintiffs' choice of forum . . .'is particularly strong in an action brought

Casey v. Truss, 720 P.2d 985, 986 (Colo. Ct. App. 1986) ("except in the 'most unusual circumstances,' the choice of a Colorado forum by a resident plaintiff will not be disturbed" (citation omitted)); Kelce v. Touche Ross & Co., 557 P.2d 374, 375 (Colo. 1976) (en banc) ("the doctrine of forum non conveniens has little place in Colorado courts. Absent the most unusual circumstances the choice of forum of a resident plaintiff will not be disturbed."); Archibald, 544 P.2d at 950-51, 126 Cal. Rptr. at 815 ("exceptional" circumstances which justify dismissal of an action brought by a resident plaintiff in that plaintiff's home forum on grounds of forum non conveniens are limited to the

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under the Securities Exchange Act since the venue provision of the Act is designed to serve the underlying federal policy of allowing the plaintiff the widest possible choice of forums.'")(citations omitted).

situation where the home forum cannot provide an adequate forum or where a nominal plaintiff sues on behalf of foreign beneficiaries or creditors); McDonnell-Douglas Corp. v. Lohn, 557 P.2d 373 (Colo. 1976). Basically, "[u]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should **rarely** be disturbed." Gilbert, 330 U.S. at 508 (emphasis added).

In its entirety, the misapplication of the doctrine of forum non conveniens in this case serves to further highlight the fact that the Ohio courts employed any colorable rationale at their disposal to skirt the obligation to address petitioner's Securities Act claims.[20]

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[20]Petitioner reemphasizes that his forum non conveniens analysis, and its comparison to the Ohio courts' inaccurate forum non conveniens analysis, is presented to support their central theme: that the Ohio courts misapplied legal and equitable

I(e)

Personal Jurisdiction

The Fifth District Court of Appeals upheld the dismissal of petitioner's claims against the individual respondents. Appendix B at 23-24. See also Appendix C at 11. The Ohio courts erred in dismissing petitioner's claims against the individual respondents on personal jurisdiction grounds for two reasons.

First, under the concurrent jurisdiction, broad venue,[21] and nationwide service of process provision[22], Section 22

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doctrines and misconstrued facts as a means to an end -- the end of petitioner's federal law claims in an Ohio forum.

[21]That venue is technically correct under Section 22 of the Securities Act has never been at issue.

[22]The nationwide service of process provision provides that "process . . . may be served in any . . . district of which the defendant is an inhabitant or wherever

of the Securities Act, the Richland County, Ohio Court of Common Pleas had jurisdiction over each of the individual respondents. In Lakewood Bank and Trust Co. v. Superior Court, 180 Cal. Rptr. 914, 918 (Ct. App. 1982), the court held

> a California court may obtain jurisdiction over [a Texas state bank with its principal place of business in Texas] pursuant to section 22(a) [of the Securities Act] only if it can be shown that a claim against [the Texas bank] is either brought to enforce any liability or duty created by the Securities Act of 1933 . . . .

In Lakewood, the Texas state bank was not qualified to do, nor was it doing, any business in California. Id. at 916.[23]

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the defendant may be found." Section 22 of the Securities Act.

[23]In Lakewood, the court did mention minimum contacts under the state long-arm statute, but such discussion was indicated to be an alternative argument and had no

Furthermore, the nationwide service of process provision denies defendants protection under the fiduciary shield doctrine.— The fiduciary shield doctrine, which shields a fiduciary from the exercise of personal jurisdiction by a state court when that person's contacts with the forum state are performed for the sole benefit of his employer, has "absolutely no application in a situation . . . where jurisdiction is predicated on [a statute] which provides for nationwide service of process." Abeloff, 119 F.R.D. at 324-25. Thus, the trial court should have availed itself of the nationwide service of process provision, and dismissal of the action against the individual respondents on

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effect upon the court's determination that the trial court could have retained jurisdiction over the Texas bank if the 1933 Act had been found to apply. See Lakewood, 180 Cal. Rptr. at 920, 916 n.1.

personal jurisdiction grounds was unwarranted and improper. See Clement v. Pehar, 575 F. Supp. 436, 438 (N.D. Ga. 1983). This error was further exacerbated by the fact that neither the Fifth Circuit nor the Supreme Court of Ohio would recognize and remedy the error.

Secondly, dismissal was improper on personal jurisdiction grounds even without reference to the nationwide service of process provision. Under an ordinary "minimum contacts" analysis, the individual respondents were amenable to suit in Richland County, Ohio. Personal jurisdiction is based upon the determination that one has "purposely established contact with the forum state." Anilas, Inc. v. Kern, 31 Ohio St. 3d 163, 164, 509 N.E.2d 1267, 1268 (1987). Thus, personal jurisdiction will be found where, as here, a party purposefully avails itself

of the privilege of conducting activities with the forum state and where the defendant has created continuing obligations between itself and the residents of the forum. Id. at 164-65, 509 N.E.2d at 1268-69. Personal jurisdiction is proper where, because of the defendant's conduct and connection with the forum state, it is foreseeable that the defendant would reasonably anticipate being haled into court in that jurisdiction. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). See also Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 475-76 (1985); Reliance Electric Co. v. Luecke, 695 F. Supp. 917, 920 (S.D. Ohio 1988) ("One's acts become purposeful if one should have reasonably foreseen that a transaction would have consequences in the forum state")(citations omitted); Wright International Express, Inc. v. Roger Dean

Chevrolet, Inc., 689 F. Supp. 788, 790 (S.D. Ohio 1988) (entering into contract with Ohio resident is sufficient to support finding that defendant purposefully availed itself of privilege of conducting business in the forum state). The actions of the individual respondents certainly give rise to "minimum contacts" such that the individual respondents would reasonably have anticipated being haled into an Ohio court. The individual respondents could have avoided exposure to liability in Ohio courts simply by not lending their names to the solicitation of Ohio residents to sell "units." However, with the expectation of pecuniary gain, the individual respondents did just that. See generally Wright International Express, Inc., 689 F. Supp. at 791-92; Burger King, 471 U.S. at 474-76. Thus, personal jurisdiction over the individual respondents is proper in this

case, and the Fifth District erred in affirming the trial court's dismissal of petitioner's claims on the ground that personal jurisdiction was lacking.

CONCLUSION

It is indeed an unusual case where a state court avoids the required exercise of jurisdiction when the claims of its own citizens are properly before it. However, the present case is just such a case. Review by this Honorable Court is warranted because the Ohio state courts have refused to exercise that jurisdiction which, by Congressional mandate, the state courts must exercise.

It is painfully apparent that the Ohio state courts did not desire to be "tied-up" with a complicated class action securities fraud case brought under federal law. The Common Pleas Court Memorandum

Decision is conspicuous proof that the court merely discarded the case. The Common Pleas Court presented an amalgamation of legal and equitable doctrines and case precedent in order to heap overlapping doubt on the efficacy of petitioner's action. Indeed, the Common Pleas Court granted summary judgment (no misstatements or omissions), dismissed the Complaint on Rule 9(B) grounds, dismissed the Complaint on Santa Fe grounds, dismissed the Complaint on forum non conveniens grounds, dismissed the Complaint against the individual defendants on personal jurisdiction grounds, and even dismissed the Complaint on the grounds that the fiduciary duty claim was only derivative in nature (reversed by the Fifth District Court of Appeals).

The Fifth District Court of Appeals

affirmed, for the most part, the errors of the trial court.

Finally, the Ohio Supreme Court failed to address any of the errors, including the erroneous application of the doctrine of forum non conveniens.

Petitioner's action is now dependent upon review by this Honorable Court. In this case, this Honorable Court is presented with the opportunity to validate the concurrent jurisdiction provision of the Securities Act, thus paving the way for future plaintiffs to bring Securities Act claims in a state forum. Petitioner has demonstrated five (I(a)-(e)) erroneous rulings, each of which has the practical effect of precluding a plaintiff from embarking on a federal securities law claim in the forbidden territory of a state court. The concurrent jurisdiction provision of the Securities

Act is currently dead. All future plaintiffs are sure to heed the lesson to be learned from the Duane Galloway model.

This Honorable Court must preserve the validity and efficacy of the Securities Act precedents. In so doing, this Court can grant the petitioner, Duane Galloway, that very chance to redress grievance that (1) Congress sought to grant when it enacted the concurrent jurisdiction provision of the Securities Act; and, (2) the Ohio state courts have denied.

Section 22 of the Securities Act has, by the rulings of the Ohio courts (detailed as parts I(a)-(e)), been rendered a dead-letter. Jurisdiction of this Court is both proper and necessary to re-focus the application of the Santa Fe doctrine, a doctrine which has been mutated by the Ohio courts. In the course of correcting the application of the Santa Fe doctrine, this

Court has a unique opportunity to resurrect the concurrency of Securities Act jurisdiction.

For the foregoing reasons, the petitioner respectfully prays that a writ of certiorari issue in this case.

Respectfully submitted,

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APPENDIX A

Entry of the Supreme Court of Ohio

Entered March 21, 1990

1990 TERM

Case No. 90-160

THE SUPREME COURT OF OHIO

DUANE L. GALLOWAY, on behalf of
Sean and Kelly Galloway, minors,

Appellant,

-vs-

LORIMAR MOTION PICTURE MANAGEMENT,
INC., et al.

Appellees.

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Richland County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no

substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by Murray & Murray.

(Court of Appeals No. CA2681)

/s/ Thomas J. Moyer
Chief Justice

APPENDIX B

Entry of the Court of Appeals
Richland County, Ohio
Fifth Appellate District

Decided and Filed December 6, 1989

Case No. CA-2681

COURT OF APPEALS RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DUANE L. GALLOWAY, on behalf of
Sean and Kelly Galloway, minors,

Plaintiff-Appellant,

-vs-

LORIMAR MOTION PICTURE MANAGEMENT,
INC., et al.

Defendants-Appellees.

O P I N I O N

CHARACTER OF PROCEEDING:
Civil Appeal from the Court of Common Pleas

Case No. 88-239-C

JUDGMENT:
Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellant

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GWIN, J.

On October 1, 1985, defendant-appellee, Lorimar Motion Picture Management, Inc. (LMPM), and defendant-appellee, Prudential-Bache Properties, Inc. (Pru-Bache), formed Lorimar Film Partners, L.P. (Partnership), a Delaware limited

partnership, for the purpose of raising capital to engage in the feature-length theatrical motion picture business. LMPM and Pru-Bache served as general partners for Partnership.

In December 1985, Partnership registered with the United States Securities and Exchange Commission, and made a public offering of 60,000 Partnership "units", priced at $1,000 each, using a prospectus and registration statement dated December 6, 1985. The prospectus indicated that capital would be raised through the selling of said units to investors and that the Limited Partnership Agreement obligated LMPM, the managing general partner, to contribute capital to the Partnership in an amount equal to the total net proceeds from the public offering of said units.

The Partnership units were sold through defendant-appellee, Prudential-Bache Securities, Inc. (Pru-Bache Securities). A total of 33,854 units were sold to 7,180 purchasers located throughout the United States. Of those numbers, 1,824 units were sold to 467 purchasers in Ohio. Plaintiff-appellant, Duane L. Galloway (appellant), an Ohio resident, purchased four units on behalf of his two minor children, Sean and Kelly Galloway, at a total cost of $4,000, on January 22, 1986.

On April 27, 1988, appellant filed an action in the Richland County Court of Common Pleas against the above named defendants and other individual defendants alleging violations of Sections 11 and 12 of the Securities Act of 1933 (first and second causes of action), negligent misrepresentation, and breach of fiduciary duty.

In August, 1988, defendants-appellees moved to dismiss the entire complaint and the trial court granted the same on February 21, 1989. The trial court, in its judgment entry, ordered that:

> (a) Counts I and II of the Complaint, which assert claims under Sections 12(2) and 11 of the Securities Act of 1933, respectively, are dismissed with prejudice for failure to state a claim, because they improperly "bootstrap" the state law breach of fiduciary duty claims contained in Count IV of the Complaint into claims under the federal securities laws;
>
> (b) Count I of the Complaint also is dismissed with prejudice as against all defendants other than Prudential-Bache Securities, because its claim that their acts were a "substantial factor in the sales transaction" fails to state a claim as against them;
>
> (c) Count III of the Complaint, which asserts a claim of negligent

misrepresentation, is dismissed with prejudice as against all defendants because it fails to state a claim upon which relief can be granted;

(d) Defendants are entitled to summary judgment on Counts I, II, and III of the Complaint because the Prospectus at issue disclosed all material facts;

(e) Count IV of the Complaint, which asserts that defendants breached their fiduciary duty, is dismissed for failure to state a claim, because it was not asserted in proper derivative form, because plaintiff failed to make a proper pre-suit demand, and because plaintiff did not plead particularized facts to excuse a demand;

(f) The entire Complaint is dismissed with prejudice as against each of the individual defendants, for lack of personal jurisdiction; and

(g) The entire Complaint is dismissed as against all defendants on the ground of forum non conveniens.

Appellant now seeks our review and raises the following assignments of error:

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT ERRED IN DISMISSING COUNTS I AND II OF PLAINTIFF'S COMPLAINT, UNDER [SECTIONS] 12(2) AND 11 RESPECTIVELY, FOR FAILURE TO STATE A CLAIM AS IMPROPER ATTEMPTS TO CONVERT STATE-LAW FIDUCIARY CLAIMS INTO FEDERAL SECURITIES CLAIMS.

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT ERRED IN AWARDING SUMMARY JUDGMENT TO DEFENDANT ON COUNTS I AND II ([SECTIONS] 12(2) AND 11) BECAUSE GENUINE ISSUES OF MATERIAL FACT REMAIN REGARDING WHETHER THE PROSPECTUS REGISTRATION STATEMENT, AND ORAL COMMUNICATIONS CONTAINED ANY FALSE OR MISLEADING STATEMENTS OF MATERIAL FACT.

ASSIGNMENT OF ERROR NO. III

THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW DISMISSING PLAINTIFF'S COMPLAINT UNDER THE AUTHORITY OF RULE 9(B).

ASSIGNMENT OF ERROR NO. IV

THE TRIAL COURT ERRED IN DETERMINING PLAINTIFF'S FOURTH COUNT FOR BREACH OF FIDUCIARY DUTY MUST BE BROUGHT AS A DERIVATIVE CLAIM WITH DEMAND, INSTEAD OF A DIRECT CLAIM.

ASSIGNMENT OF ERROR NO. V

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY DISMISSING PLAINTIFF'S LAWSUIT ON THE BASIS OF FORUM NON CONVENIENS.

ASSIGNMENT OF ERROR NO. VI

THE TRIAL COURT ERRONEOUSLY DISMISSED THE COMPLAINT AGAINST INDIVIDUAL DEFENDANTS FOR LACK OF PERSONAL JURISDICTION.

I

The prospectus involved in the instant appeal provided in pertinent part:

CONFLICTS OF INTEREST

The Partnership will be subject to certain conflicts of interest

> arising out of its relationships with the General Partners and their Affiliates. Certain provisions of the Partnership Agreement are designed to protect the interests of the Limited Partners in situations where conflicts exist by providing that any transactions between the Partnership and the Managing General Partner or an Affiliate of the Managing General Partner must be approved by the Advisory Committee or, in certain instances, the Co-General Partner. (Emphasis added).
>
> (P. 24).

Appellant, in his complaint (paragraph 33), admits that said Advisory Committee did in fact exist. However, appellant asserted that defendants-appellees "did not intend to adhere to these [conflict of interest] procedures, and that the Managing General Partner intended to have sole authority and discretion to act for and bind the

Partnership in the conflict of interest situations described above." (Paragraph 34 of complaint).

In his first assignment, appellant claims that he should be entitled to proceed to trial on the allegations that defendants-appellees' statements regarding "Advisory Committee procedures" were false and misleading communications in violation of the 1933 Securities Act, and therefore the trial court erred in dismissing Counts I and II for failure to state a claim. In other words, appellant claims that because LMPM selected a film and compiled its budget which resulted in a decrease in the unit investors' profits while increasing LMPM's profits without Advisory Committee approval, there are sufficient allegations that defendants-appellees intended, at the time the prospectus was issued, not to follow the Advisory Committee procedures.

Furthermore, appellant claims that he purchased partnership units based upon the assurances contained in the prospectus that the Advisory Committee would oversee decisions of the two General Partners in budget matters and film selection. We find both claims without merit.

On page forty-six of the prospectus under the heading "Advisory Committee," the following appears at the end of that section:

> If the Advisory Committee dissolves, the Managing General Partner is required to assume the duties and obligations of the Advisory Committee which are to be exercised in the best interest of the Partnership.

Clearly, the prospectus informed appellant that the Advisory Committee could be dissolved and that the Managing General Partner (LMPM) could assume its duties. Additionally, should LMPM assume the

Advisory Committee duties, as here, LMPM must act in the best interest of the Partnership. Thus, it would appear appellant's charges against defendants-appellees are in fact a breach of the "best interests" requirement.

Appellant's causes of action I and II merely state that defendants-appellees failed to comply with Advisory Committee procedures, and such, as indicated above, is tantamount to claiming a breach of exercising Advisory Committee duties in the best interests of the Partnership or a breach of fiduciary duty. Appellant's attempt to make this into a federal securities violation simply by charging that defendants-appellees "intended not to adhere to Advisory Committee procedures" is not, in and of itself, sufficient to accomplish that objective. See Lester v.

Preco Industries, Inc. (1965), 282 F. Supp. 459.

To endorse appellant's position would permit stockholders who are unhappy with a management decision to claim that management "did not intend to" follow assertions set out in the prospectus and thereby convert a breach of fiduciary duty claim into a federal security claim.

Therefore, we find that Counts I and II were properly dismissed for failure to state a claim because they improperly attempt to covert a breach of fiduciary duty into a federal securities violation. Although appellant vehemently disagrees, we find that Santa Fe Industries v. Green (1977), 430 U.S. 462 supports our decision.

Accordingly, appellant's first assignment of error is overruled.

II

In his second assignment, appellant claims that the trial court erred in granting summary judgment against appellant's Counts I and II because there is a material question whether a reasonable investor would consider the disclosures in the prospectus, regarding the Advisory Committee procedures, material and whether such disclosures were false.

When reviewing motions for summary judgment pursuant to Civ. R. 56, "[t]he inferences to be drawn from the underlying facts contained in the affidavits and other exhibits must be viewed in the light most favorable to the party opposing the motion, and if when so viewed reasonable minds can come to different conclusions the motion should be overruled." Hounshell v.

American States Ins. Co. (1981), 67 Ohio St.2d 427, 433.

We believe that reasonable minds, upon reading the prospectus, could only conclude that the Advisory Committee procedures were sufficiently disclosed, that the Advisory Committee procedures could be bypassed, and that said disclosures were not false.

Therefore, summary judgment was proper and appellant's second assignment of error is hereby overruled.

III

In his third assignment, appellant claims that because he did not charge defendants-appellees with fraud but instead charged them with making false and misleading statements under Section 11, the trial court erred in applying Civ. R. 9(B).

Civil Rule 9(B), patterned after Fed. R. 9(b), provides:

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

We believe the trial court properly applied Civ. R. 9(B) to appellant's first and second causes of action. Appellant's allegation that defendants-appellees "did not intend" to follow the Advisory Committee procedures or other statements contained in the prospectus is an allegation that defendants-appellees intended to defraud or had knowledge of false statements contained in the

prospectus. Therefore, we believe it is not unreasonable to require more than mere conclusory allegations of such intent. Center Sav. & Loan Ass'n v. Prudential-Bache Sec. (S.D.N.Y. 1987), 679 F.Supp. 274 (Fed. R. 9(b) applied to alleged violations of Section 12(2) of the 1933 Securities Act).

Accordingly, appellant's third assignment of error is hereby overruled.

IV

Appellant claims in his fourth assignment that the trial court erred in its determination that appellant's fourth count for breach of fiduciary duty must be brought derivatively and not directly. We agree.

There are numerous provisions throughout the prospectus stating that unit holders will become assignees of the

Assignor Limited Partner. The prospectus then states that:

> Under Delaware law, an assignee, unlike a substituted Limited Partner, is not entitled to all the statutory rights of a Limited Partner, including, without limitation, the right to maintain a derivative action . . . .
>
> (p.88).

Clearly, the prospectus gives unit holders the status of assignees and precludes the same from maintaining a derivative action.* Therefore, appellant's fourth cause of action for breach of fiduciary duty was properly brought as a direct action.

Accordingly, appellant's fourth assignment of error is sustained.

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*We do not, at this time, decide whether such duplicity in a prospectus is enforceable against a unit holder.

V

The trial court, in its memorandum decision, found that:

> . . . Ohio has only extremely tenuous links with the underlying facts and circumstances of this action, and would be an inconvenient forum for this litigation. In contrast, most, if not all of the relevant documents and witnesses appear to be located in California, and many of the alleged wrongful acts appear to have taken place in California.
>
> Specifically, this litigation would focus upon thousands of financial transactions involved in the production of four full-length motion picture films at Lorimar's studios in the Los Angeles area. Eight of the thirteen defendants are located in California. Most if not all of the witnesses that have any knowledge of these financial transactions and the documents recording them, and experts that understand the motion picture

> industry and its production, financial and accounting practices, appear to be located in California. In contrast, the only arguable link between this case and Ohio is that the plaintiff--who purports to represent a nationwide class -- is from Sandusky. No defendant is headquartered here and only one has any operations here. All of these factors demonstrate that Ohio would be an inconvenient forum for this action, and warrant dismissal.

Appellant claims that the trial court erred in applying forum non conveniens to the case sub judice.

In Chambers v. Merrell-Dow Pharmaceuticals, Inc. (1988), 35 Ohio St.3d 123, our Supreme Court held:

> The common-law doctrine of forum non conveniens is committed to the sound discretion of a court of general jurisdiction, and may be employed pursuant to the inherent powers of such court to achieve the ends of justice and convenience

of the parties and witnesses.

Therefore, our review is limited to whether the trial court abused its discretion in its application of forum non conveniens. Abuse of discretion connotes: "'not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency.'" State, ex rel. Commercial Lovelace Motor Freight, Inc. v. Lancaster (1986), 22 Ohio St.3d 191, 193, quoting State, ex rel. Shafer v. Ohio Turnpike Comm. (1953), 159 Ohio St. 581, 590-591.

Based on the foregoing, we do not find that the trial court abused its discretion in its application of forum non conveniens, and therefore, appellant's fifth assignment of error is hereby overruled.

VI

In his final assignment, appellant claims that the trial court erroneously dismissed the complaint against the individual defendants-appellees for lack of person jurisdiction. We disagree.

It is well settled that the burden of establishing jurisdiction over the individual defendants-appellees is upon appellant. McNutt v. General Motors Acceptance Corp. (1936), 298 U.S. 178, 189. Furthermore, jurisdiction over individual officers of a partnership or corporation cannot be based merely on jurisdiction over that partnership or corporation. Weller v. Cromwell Oil Co. (6th Cir. 1974), 504 Fed.2d 927, citing Wilshire Oil Co. of Texas v. Riffe (10th Cir. 1969), 409 Fed.2d 1277.

In the instant case, we find that appellant failed to allege sufficient facts "to make it reasonable and just, consistent with traditional notions of fair play, and in conformity with due process requirements of the Fourteenth Amendment" to subject the individual defendants-appellees to personal liability arising out of their alleged conduct concerning this case. Weller, supra, at 931; International Shoe Co. v. Washington (1945), 326 U.S. 310.

Therefore, appellant's final assignment of error is hereby overruled. For the foregoing reasons, the judgment of the Court of Richland County, Ohio, is hereby affirmed.

Milligan, P.J. and

Hoffman, J. concur.

/s/ W. Scott Gwin
/s/ John R. Milligan
/s/ John R. Hoffman
JUDGES

WSG/emc 1122

Entry of the Court of Appeals
Richland County, Ohio
Fifth Appellate District

Decided and Filed December 6, 1989

Case No. CA-2681

COURT OF APPEALS RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DUANE L. GALLOWAY, on behalf of
Sean and Kelly Galloway, minors,

Plaintiff-Appellant,

-vs-

LORIMAR MOTION PICTURE MANAGEMENT,
INC., et al.

Defendants-Appellees.

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion in file, the judgment of the Court of Common Pleas of Richland County, Ohio, is affirmed.

/s/ W. Scott Gwin
/s/ John R. Milligan
/s/ John R. Hoffman

JUDGES

APPENDIX C

Entry of the Court of Common Pleas
Richland County, Ohio

Decided and Filed February 21, 1989

Case No. 88-239-C

Judge James D. Henson

IN THE COURT OF COMMON PLEAS
RICHLAND COUNTY, OHIO

DUANE L. GALLOWAY, on behalf of
Sean and Kelly Galloway, minors,

Plaintiff,

-against-

LORIMAR MOTION PICTURE MANAGEMENT,
INC., et al.

Defendants.

JUDGMENT AND ORDER

Plaintiff commenced this action in April 1988, against Lorimar Motion Picture Management, Inc., Lorimar-Telepictures Corp., Prudential-Bache Properties, Inc.,

Prudential-Bache Securities, Inc., and a number of individual defendants. Thereafter, defendants moved to dismiss the Complaint on a variety of grounds. The parties then submitted extensive briefs, had lengthy oral argument before the Court and submitted post-argument briefs. The Court has carefully reviewed the parties' arguments and is prepared to rule on the pending motions. For the reasons set forth in the accompanying Memorandum Decision, it is hereby ordered that:

(a) Counts I and II of the Complaint, which assert claims under Section 12(2) and 11 of the Securities Act of 1933, respectively, are dismissed with prejudice for failure to state a claim, because they improperly "bootstrap" the state law breach of fiduciary duty claims contained in Count IV of the Complaint into claims under the federal securities laws;

,,

(b) Count I of the Complaint also is dismissed with prejudice as against all defendants other than Prudential-Bache Securities, because its claim that their acts were a "substantial factor in the sales transaction" fails to state a claim as against them;

(c) Count III of the Complaint, which asserts a claim of negligent misrepresentation, is dismissed with prejudice as against all defendants because it fails to state a claim upon which relief can be granted;

(d) Defendants are entitled to summary judgment on Counts I, II, and III of the Complaint because the Prospectus at issue disclosed all material facts;

(e) Count IV of the Complaint, which asserts that defendants breached their fiduciary duty, is dismissed for failure to state a claim, because it was

not asserted in proper derivative form, because plaintiff failed to make a proper pre-suit demand, and because plaintiff did not plead particularized facts to excuse a demand;

(f) The entire Complaint is dismissed with prejudice as against each of the individual defendants, for lack of personal jurisdiction; and

(g) The entire Complaint is dismissed as against all defendants on the ground of forum non conveniens.

IT IS SO ORDERED.

/s/ Judge James D. Henson

C - 89

Entry of the Court of Common Pleas
Richland County, Ohio

Decided and Filed February 21, 1989

Case No. 88-239-C

Judge James D. Henson

IN THE COURT OF COMMON PLEAS
RICHLAND COUNTY, OHIO

DUANE L. GALLOWAY, on behalf of
Sean and Kelly Galloway, minors,

Plaintiff,

-against-

LORIMAR MOTION PICTURE MANAGEMENT,
INC., et al.

Defendants.

MEMORANDUM DECISION

Plaintiff commenced this action in April 1988, against Lorimar Motion Picture Management, Inc., Lorimar-Telepictures Corp., Prudential-Bache Properties, Inc.,

Prudential-Bache Securities, Inc., and a number of individual defendants. Counts I, II, and III of plaintiff's Complaint allege that the defendants violated Sections 11 and 12(2) of the Securities Act of 1933, 15 U.S.C. § 77k and 771(2)), and common law, by issuing an allegedly materially false and misleading Prospectus, dated December 6, 1985, for the public offering and sale of Units in Lorimar Film Partners, L.P. (the "Partnership"), a limited partnership which defendants established to produce feature-length theatrical motion pictures. Count IV of the Complaint claimed that the defendants mismanaged the Partnership and thereby breached their fiduciary duty to the Unitholders. Plaintiff seeks to represent a class of all purchasers of Units (approximately 7,000 persons), and seeks rescission of the class' purchase of 33,854 Units at a total cost of

$33,854,000, or, in the alternative, damages.

In August 1988, defendants moved to dismiss the Complaint on a number of grounds, including failure to state a claim (Rule 12(B)), failure to plead fraud with particularity (Rule 12(B)), failure to plead the breach of fiduciary duty claim in proper derivative form, as required under Delaware law, and lack of personal jurisdiction over the individual defendants. Defendants also moved in the alternative for summary judgment on Plaintiff's three nondisclosure claims (Counts I, II and III), on the ground that the Prospectus disclosed all material facts (Rule 56). Apart from their claims on the merits, defendants also moved to dismiss the Complaint under the doctrine of forum non conveniens. Following extensive briefing by all parties, lengthy oral

argument before the Court, and additional post-argument briefs, the Court is convinced that defendants' motions have merit, and that the Complaint should be dismissed with prejudice as to certain counts (as explained below) and without leave to replead certain remaining counts in Ohio, for the reasons set forth below.

A. Counts I, II, and III

First, the Court finds that plaintiff's claims under Sections 11 and 12(2) of the Securities Act of 1933 fail to state a claim and should be dismissed with prejudice. The "omission" allegations contained in paragraphs 29, 30, and 31 to 34 of the Complaint are, quite simply, an improper attempt to "bootstrap" the state-law breach of fiduciary duty claims presented in Count IV of the Complaint into claims under the federal securities laws,

and should be dismissed with prejudice under the Supreme Court's decision in Santa Fe Industries v. Green, 430 U.S. 462 (1977).*

In addition, defendants are entitled to summary judgment on all of plaintiff's nondisclosure claims under Counts I-III (including the claim for negligent misrepresentation in Count III), because the Court specifically finds that the Prospectus disclosed all material facts. Plaintiff asserts that the

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*In addition, apart from this fundamental defect, plaintiff's claim under Section 12(2) (Count I) must be dismissed as against all defendants other than Prudential-Bache Securities. Plaintiff's sole basis for its claim against these other defendants is the conclusory assertion that "the acts of all defendants were . . . a substantial factor in the sales transaction." (Complaint ¶ 35) In Pinter v. Dahl, ___ U.S. ___, 108 S. Ct. 2063, 2082 (1988), the Supreme Court unequivocally rejected the "substantial factor" test as a basis for liability under Section 12.

Prospectus was false and misleading because it did not state that payments from the Partnership to Lorimar would be "unreasonably high," because it did not state that defendants intended to pay to themselves "virtually the entire proceeds of the offering," and because it failed to state that defendants supposedly intended to disregard an "Advisory Committee." (Complaint ¶¶ 29-30, 34) However, the Prospectus adequately disclosed all material facts relating to the payments which defendants would receive from the Partnership; the Prospectus simply was not required to use the characterizations or "editorializations" demanded by plaintiff. Lessler v. Little, 857 F.2d 866, 875 (1st Cir. 1988); Kas Financial General Bankshares, 796 F.2d 508, 517 (D.C. Cir.

1986); Golub v. PPD Corp., 576 F.2d 759, 762-63 (8th Cir. 1978).*

Plaintiff's negligent misrepresentation claim (Count III) also fails to state a claim for the additional reason that the plaintiff was not a member of a "special limited class (or group) of foreseeable persons." See Gunter v. Dow Jones, Inc., 22 Ohio St. 3d 286, 490 N.E.2d 898, 900 (1986) (limiting the tort of negligent misrepresentation to "a special

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*In addition, the Complaint made only conclusory allegations that defendants "intended to" made "unreasonable high" payments and to disregard the Partnership's "Advisory Committee. The Complaint's vague and conclusory allegations with respect to defendants' intent fail to meet the strict requirements of Rule 9(B). See Stern v. Leucadia National Corp., 844 F.2d 997, 1004 (2d Cir.), cert denied, 109 S. Ct. 137 (1988); Center Savings & Loan Association v. Prudential-Bache Securities, Inc., 679 F. Supp. 274, 278 (S.D.N.Y. 1987); Bozsi Limited Partnership v. Lynott, 676 F. Supp. 505, 509-10 (S.D.N.Y. 1987); In re Elscient Ltd. Securities Litigation, 674 F. Supp. 374, 384 (D. Mass. 1987).

limited class (or group) of foreseeable persons," because a "contrary result would . . . extend liability to all the world"). I agree with the rationale set forth in In re Worlds of Wonder Securities Litigation, 694 F. Supp. 1427, 1436 (N.D. Cal. 1988) and In re Coleco Securities Litigation, 541 F. Supp. 1488, 1493 (S.D.N.Y. 1984), that when a Prospectus is disseminated to the investing public at large, a purchaser of the securities offered is a member of "a classically faceless or unresolved class of persons." Accordingly, Count III should be dismissed with prejudice as well.

B. Count IV

Plaintiff's fourth cause of action, for an alleged breach of fiduciary duty, must also be dismissed, because plaintiff failed to assert it in its proper derivative form. Under Delaware law, which

governs this claim because the Partnership is a Delaware limited partnership,* the Court is required to look at the body of the Complaint, and the nature of the wrong alleged, and not to plaintiff's own designation or description of his claim, to determine whether the claim is derivative in nature. Kramer v. Western Pacific Indus., 546 A.2d 348, 352 (Del. 1988). Looking at the body of the Complaint, the Court finds that its claim that defendants "wrongfully deplet[ed] partnership assets" are classic claims of "mismanagement resulting in corporate waste" which must be brought in derivative form. Kramer, 546 A.2d at 351, 353.*

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*See Ohio Rev. Code Ann. § 1782.48 (Anderson 1985), which codifies the so-called "internal affairs" doctrine.

*I also reject plaintiff's claim that the Complaint pleads sufficient facts to excuse a pre-suit demand upon the general partners of the Partnership. Under

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Delaware law, a plaintiff must plead "particularized facts" showing why demand should be excused. Aronson v. Lewis, 473 A.2d 805, 813-17 (Del. 1987). Plaintiff's Complaint contains no such particularized allegations. In fact, I find that plaintiff cannot show that a demand would have been futile. For example, according to plaintiff's own briefs, plaintiff seeks to redress the Managing General Partner's alleged "siphon[ing] of all the partnership's initial capital by overcharging it for goods and services." (Pl's Sept. 23 Mem. at 4) The Complaint does not allege that Prudential-Bache Properties, the Co-General Partner, participated in any such "overcharging." Accordingly, there is no reason why a demand upon Prudential-Bache Properties would have been futile.

Furthermore, plaintiff's claim that Lorimar Motion Picture Management, the Managing General Partner, "wasted" the Partnership's capital is, in essence, a claim that Lorimar Motion Picture Management willingly wasted $29 million of its own money. Plaintiff has made no showing that a demand upon Lorimar Motion Picture Management would have been futile.

Finally, plaintiff's claim at the December 2 hearing that he made a proper pre-suit demand is without merit. Plaintiff's counsel's letters requesting information did not constitute a demand, and there is no evidence in the record of any proper demand.

C. Claims Against the Individual Defendants

Apart from the defects described above, plaintiff's Complaint must be dismissed with prejudice as against the individual defendants for lack of personal jurisdiction. The individual defendants have submitted affidavits which show that they had no personal contacts with Ohio concerning the matters described in the Complaint. In any event, plaintiff has failed to present any evidence of any kind to rebut the facts set forth in those affidavits. Accordingly, the Complaint should be dismissed with prejudice as against the individual defendants. See Weller v. Cromwell Oil Co., 504 F.2d 927 (6th Cir. 1974).

D. Forum Non Conveniens

Finally, apart from the grounds described above, I find that even if the Complaint stated a cause of action (which

it does not), defendants' forum non conveniens arguments have merit. Reviewing the factors set forth by the Ohio Supreme Court in Chambers v. Merrell-Dow Pharmaceuticals, Inc., 35 Ohio St. 3d 123, 519 N.E.2d 370 (1988), I find that Ohio has only extremely tenuous links with the underlying facts and circumstances of this action, and would be in inconvenient forum for this litigation. In contrast, most, if not all of the relevant documents and witnesses appear to be located in California, and many of the alleged wrongful acts appear to have taken place in California.

Specifically, this litigation would focus upon thousands of financial transactions involved in the production of four full-length motion picture films at Lorimar's studios in the Los Angeles area. Eight of the thirteen defendants are

located in California. Most if not all of the witnesses that have any knowledge of these financial transactions and the documents recording them, and experts that understand the motion picture industry and its production, financial and accounting practices, appear to be located in California. In contrast, the only arguable link between this case and Ohio is that the plaintiff -- who purports to represent a nationwide class -- is from Sandusky. No defendant is headquartered here and only one has any operations here. All of these factors demonstrate that Ohio would be an inconvenient forum for this action, and warrant dismissal.

For all of the foregoing reasons, defendants' motions to dismiss the Complaint and for summary judgment are granted.

/s/ Judge James D. Henson

APPENDIX D

§ 77k Civil liabilities on account of false registration statement

(a) In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue --

(1) every person who signed the registration statement;

(2) every person who was a director of (or a person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

§ 771 Civil liabilities arising in connection with prospectuses and communications

Any person who --

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

§ 77v **Jurisdiction of offenses and suits**

(a) The district courts of the United States and United States courts of any Territory, shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of Title 28. No case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the

Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.